

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN DOE, et al.,

Plaintiffs,

v.

**MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION, et
al.,**

Defendants.

Case No. 2:08 CV 575

Judge Frost

Magistrate Judge King

FINAL PRETRIAL ORDER

This action came before the Court at a final pretrial conference held on April 13, 2010 at 12:00 p.m. pursuant to Fed. R. Civ. P. 16.

I. APPEARANCES:

For Plaintiffs: Douglas M. Mansfield, Leslie E. McCarthy and Matthew R. Johnson of Jones Day.

For Defendant: Robert H. Stoffers and Jason R. Deschler of Mazanec, Raskin, Ryder & Keller Co., L.P.A. and R. Kelly Hamilton of R. Kelly Hamilton, LLC.

II. NATURE OF ACTION AND JURISDICTION:

A. This is an action brought by Stephen and Jenifer Dennis, individually and as natural parents and next friends of their minor child, ZD (collectively the “Dennises”), against John Freshwater for claims of violations of the Establishment Clause of the First Amendment of the United States Constitution pursuant to 42 U.S.C. 1983 and for a claim of battery under Ohio law. The Dennises seek nominal, compensatory and punitive damages in addition to attorneys fees and other litigation costs pursuant to 42 U.S.C. 1988.

B. The jurisdiction of the Court is invoked under 28 U.S.C. 1331, 1343(3) and 1343(4) for causes of action arising under the First and Fourth Amendments to the Constitution of the United States of America and 42 U.S.C. 1983 and 28 U.S.C. 1367 for causes of action arising under the laws of the State of Ohio.

C. The jurisdiction of the Court is not disputed.

III. TRIAL INFORMATION:

A. The estimated length of trial is five (5) days.

B. Jury trial has been set for May 24, 2010 pursuant to the General Order on Trial Assignment.

IV. AGREED STATEMENTS AND LISTS:

A. General Nature of the Claims of the Parties.

1. Plaintiffs' Claims:

This case is about an eighth grade science teacher, Defendant John Freshwater, whom Plaintiffs allege violated federal and state law by burning one of his students, ZD, then 13 years old, with a device known as a Tesla coil and by unconstitutionally endorsing religion in his public school classroom at Mount Vernon Middle School. The Dennises filed this lawsuit on their son's behalf, alleging, among other things, that Freshwater committed battery when he applied the Tesla coil to ZD's arm, and that Freshwater violated the Establishment Clause of the First Amendment by, among many other things, displaying religious postings in his classroom and endorsing religion in his position as a public school educator at Mount Vernon Middle School during the 2007-2008 school year. Plaintiffs, at the final pretrial conference, agreed to withdraw their First Amendment retaliation claim.

2. Defendant's Claims:

Defendant denies that he violated the Plaintiffs' constitutional rights by his classroom instruction. Defendant asserts that all displays in his room were for a secular purpose and/or authorized by the School District Administration for use with the Fellowship of Christian Athletes.

Defendant denies that he burned or otherwise committed a battery on ZD. Further, Defendant asserts that ZD's conduct in consenting to an application of the Tesla coil negates his claim for battery.

B. Uncontroverted Facts.

The following facts are established by admissions in the pleadings or by stipulation of counsel:

1. John Freshwater taught eighth grade science at Mount Vernon Middle School during the 2007-2008 school year.
2. ZD was an eighth grade student who attended Mount Vernon Middle School during the 2007-2008 school year.
3. ZD was a student in John Freshwater eighth period science class during the 2007-2008 school year.

Other than these admissions or stipulations and the stipulation regarding jurisdiction of this Court, as outlined above in Part II of this Final Pretrial Order, the parties have agreed on no other uncontroverted facts.

C. Contested Issues of Fact and Law.

1. Contested Issues of Fact:

The contested issues of fact remaining for decision are:

Plaintiffs:

- a. John Freshwater, during the 2007-2008 school year, displayed various religious items in his classroom in addition to the materials stipulated to above.
- b. John Freshwater, beyond the facts stipulated to above, inappropriately advanced his religious beliefs in his science classroom during the 2007-2008 school year. John Freshwater advanced through various means, including, but not limited to the use of religious materials and student handouts, the discussion of and debate on certain religious topics, and the promotion of creationism and/or intelligent design as an alternative to evolution.
- c. When, as stipulated to above, John Freshwater touched ZD on December 6, 2007 with a Tesla Coil, this offensive touching left a burn and/or mark in the shape of a cross.

Defendant:

Battery

- a. Was the application of the Tesla coil on ZD a battery?
- b. If the application of the Tesla coil on ZD is found to be a battery, does ZD's consent, bar recovery?
 - (1) Did ZD maintain the capacity to consent to an application of the Tesla coil?
 - (2) If so, did Mr. Freshwater exceed the scope of ZD's consent?
- c. Did ZD's alleged duress during the application of the Tesla coil negate his consent?

Establishment Clause Claims

- a. Did the displays, in Mr. Freshwater classroom have a secular purpose?
- b. Would an objective observer acquaint the displays, in Mr. Freshwater's classroom as a state endorsement of religion?

- c. Are Plaintiffs' allegations against Mr. Freshwater regarding his classroom instruction accurate?
 - (1) If so, does the alleged improper classroom instruction of Mr. Freshwater have a secular purpose?
 - (2) If so, would an objective observer view or perceive the alleged improper classroom instruction of Mr. Freshwater as a state endorsement of religion?
- d. Are the allegations regarding Mr. Freshwater's conduct as the faculty advisor for Fellowship of Christian Athletes accurate?
 - (1) If so, does the alleged improper conduct of Mr. Freshwater, as faculty advisor for Fellowship of Christian Athletes, have a secular purpose?
 - (2) If so, would an objective observer view or perceive the alleged improper conduct of Mr. Freshwater, as faculty advisor for Fellowship of Christian Athletes, as a state endorsement of religion?

2. Contested Issues of Law:

There are no special issues of law reserved other than those implicit in the foregoing issues of fact, pending motions, and the general nature of the claims of the Parties.

D. Witnesses:

- 1. Plaintiffs: Plaintiffs reserve the right to call at the trial the following witnesses:
 - a. ZD
 - b. Jenifer Dennis
 - c. Stephen Dennis
 - d. John Freshwater, as on cross
 - e. Stephen Short
 - f. William White

- g. Katie Beach
- h. Elle M. Button
- i. Kathy Kasler
- j. Kerri Mahan
- k. Bonnie Schutte
- l. James Stockdale
- m. Deborah Strouse
- n. Student No. 5
- o. Student No. 7
- p. Student No. 168
- q. Student No. 399
- r. Student No. 561
- s. Ian Watson
- t. Father Mark Hammond
- u. Representative of Tesla coil manufacturer

Plaintiffs reserve the right to call such rebuttal witnesses as may be necessary, without prior notice to Defendant. Further, Plaintiffs reserve the right to call additional witnesses necessary to authenticate documents, including those that may be discovered based on this Court's ruling on Plaintiffs pending motion to compel. (*See* Pls.' Mot. to Compel Produc. of Docs. and Further Dep. of John Freshwater (Doc. No. 67) (hereinafter "Pls.' Mot. to Compel"). Finally, Plaintiffs reserve the right to call as witnesses any individuals identified by Defendant as witnesses he will or may call at trial.

2. Defendants:

- A. Defendants anticipate filing a Motion in Limine excluding all witness testimony and evidence concerning any prior or subsequent matters which do not include 2007-2008 8th Period Science Class of John Freshwater. Defendant will call or will have available for testimony at trial those witnesses whose names are set forth below:

- i. John Freshwater
- ii. Deb Strouse
- iii. Steven Short
- iv. William White
- v. Student No. 5
- vi. Student No. 81
- vii. Student No. 168
- viii. Kerri Mahan
- ix. Ruth Frady
- x. Pastor Zirkle
- xi. ZD, as on cross
- xii. Jenifer Dennis, as on cross
- xiii. Stephen Dennis, as on cross
- xiv. Student No. 4
- xv. Student No. 16

Defendant reserves the right to call such rebuttal witnesses as may be necessary, without prior notice to Plaintiffs. Defendant also reserves the right to call as witnesses any individuals identified by Plaintiffs as witnesses they will or may call at trial.

- B. In the alternative, should Defendant's Motion in Limine be denied Defendant will call or will have available for testimony at trial those witnesses whose names are set forth below:

- i. John Freshwater
- ii. Lori Miller
- iii. Dino D'ettore

- iv. Tim Keib
- v. Jeff Kuntz
- vi. Steven Short
- vii. William White
- viii. Deb Strouse
- ix. Bill Cunningham
- x. Kathy Kassler
- xi. Bill Oxenford
- xii. Student No. 5
- xiii. Student No. 169
- xiv. Student No. 81
- xv. Student No. 168
- xvi. Student No. 4
- xvii. Carrie Mahan
- xviii. Ruth Frady
- xix. Pastor Zircle
- xx. Jeff Maley
- xxi. Brad Ritchey
- xxii. Chuck Adkins
- xxiii. Student No. 401
- xxiv. ZD, as on cross
- xv. Jenifer Dennis, as on cross

xvi. Stephen Dennis, as on cross

Defendant reserves the right to call such rebuttal witnesses as may be necessary, without prior notice to Plaintiffs. Defendant also reserves the right to call as witnesses any individuals identified by Plaintiffs as witnesses they will or may call at trial.

3. In the event other witnesses are to be called at the trial, a statement of their names and addresses and the general subject matter of their testimony will be served upon opposing counsel and filed with the Court at least ten (10) days prior to trial.
4. There is reserved to each of the parties the right to call such rebuttal witnesses as may be necessary, without prior notice to the other party.

E. Expert Witnesses

Plaintiffs do not intend to call expert witnesses in their case-in-chief but reserve the right to call Dr. Joseph Faber, Dr. Brian Levy and/or Dr. Patricia Princehouse on rebuttal depending on the claims or testimony of Defendant or his witnesses. These expert witnesses were identified and testified in the state termination proceedings against Defendant Freshwater. The experts' qualifications have been previously provided to Defendant's counsel.

Defendant does not intend to call expert witnesses and objects to Plaintiffs' reservation to call expert witnesses as Plaintiffs' failed to comply with the dictates of Fed. R. Civ. P. 26 and this Court's Preliminary Pretrial Order (Document No. 35).

F. Exhibits

Exhibit lists are attached as appendices to the pretrial order as follows:

Appendix A	Plaintiffs' Exhibits
Appendix B	Defendant's Exhibits
Appendix C	Defendant's Alternate Exhibits

Plaintiffs note that additions may be added to their exhibit list based on this Court's ruling on Plaintiffs' pending motion to compel. (*See* Pls.' Mot. to Compel.)

G. Depositions

Testimony of no witnesses will be offered by deposition/video tape, except as agreed to by counsel and filed with the Court at least ten (10) days before trial.

H. Discovery

The following provisions were made for discovery:

1. The parties await this Court ruling on Plaintiffs' pending motion to compel to resolve a discovery dispute. (*See* Pls.' Mot. to Compel.)
2. Discovery beyond the pending motion to compel is limited to an agreement among counsel that depositions may be taken of any opposing parties' witnesses not previously deposed at least fifteen (15) days before trial.
3. Beyond the pending motion to compel and the agreement among counsel regarding depositions, discovery has been completed.

V. MODIFICATION

The Final Pretrial Order may be modified at or prior to the trial of this action, or prior thereto, to prevent manifest injustice. Such modification may be made by application of counsel or on motion of the Court.

VI JURY INSTRUCTIONS

The parties shall confer in advance of the final pretrial conference and agree upon proposed jury instructions which shall be delivered to the Court seven (7) days before the trial date. If the parties are unable to agree on how the jury should be instructed as to any issue, they shall each submit their proposed instructions on any such issue(s). There is reserved to counsel the right to submit supplemental requests for instructions during the trial or at the conclusion of the evidence on matters that cannot be reasonably anticipated. All proposed jury instructions

shall be submitted in hard copy and on 3.5" diskettes in a format compatible with WordPerfect for Windows version 6.1 or later.

VII. SETTLEMENT EFFORTS

The parties have discussed settlement, but have, as of yet, been unable to reach agreement. Those discussions are ongoing at the time of the filing of this Pretrial Order.

VIII. ADDITIONAL ACTION TAKEN

Gregory L. Frost
United States District Judge

/s/ Douglas M. Mansfield

Counsel for Plaintiffs

s/ Robert H. Stoffers and Jason R. Deschler

Counsel for Defendant

R. Kelly Hamilton; Submitted, waiting approval

Co-Counsel for Defendant

APPENDIX A: Plaintiffs' Exhibit List

Number	Description	AD	ID	PROF
1	Photographs of ZD' arm after the Tesla coil incident on December 6, 2007			
2	John Freshwater's <i>My Living Bible</i>			
3	Book cover with "Good Thinking" and "The Ten Commandments"			
4	Photographs of John Freshwater's 2007-2008 classroom desk			
5	Photographs of John Freshwater's 2007-2008 classroom bulletin boards			
6	Photographs of John Freshwater's 2007-2008 classroom shelf with <i>Icons of Evolution</i> , <i>Refuting Evolution</i> and <i>Lies in the Textbooks</i>			
7	Photograph of 2007-2008 cupboard postings of John Freshwater			
8	Photograph of 2007-2008 classroom materials, including "Cross Club News" poster, of John Freshwater			
9	Photograph of 2007-2008 Ten Commandments window postings of John Freshwater			
10	Science Student Data Sheets from 2007-2008			
11	Science Student Data Sheet from ZD from 2007-2008			
12	Multiple Intelligences Surveys from 2007-2008			
13	"Ten questions to ask your biology teacher about evolution" (2 pp.)			
14	"Reaching for the Sky" with handwritten notes (4 pp.)			
15	"Darwin Theory of Evolution - A Theory In Crisis" from Allaboutscience.com			
16	CD of "The Watchmaker" video			
17	"The Watchmaker" from kids4truth.com			
18	"About Answers in Genesis" (1 p.)			
19	"Darwin Theory of Evolution A Theory in Crisis"			
20	"The Woodpecker" worksheet (4 pp.)			
21	"The Giraffe" worksheet (4 pp.)			
22	"Quiz Giraffe + Woodpecker"			
23	"Quiz - Have Fun" quiz regarding Angler fish and eggs			
24	"Dragon History" handout			
25	"Dinosaur Fossils - Age Old Debate" handout			
26	"Dinosaur Extinction" handout			
27	"Survival of the Fakest" article			
28	Extra credit assignment to watch <i>Expelled</i>			
29	<i>Expelled</i> the movie			
30	<i>Expelled</i> movie preview			

31	Answersingenesis.org "About Answers in Genesis" page			
32	Handwritten notes of John Freshwater regarding May 20-May 22 Bellwork			
33	Handwritten notes with May 13 and May 15 Bellwork			
34	Dinosaur Extinction - Compelling New Theory from All About God Ministries, Inc.			
35	All About Creation - In the Beginning God... from AllAboutGod.com			
36	Document entitled "QUIZ-CHAPTER #16"			
37	<i>Abundant Life New Testament</i> given to ZD from John Freshwater			
38	Letter to Stephen Short from Jessica Philemond dated 4/14/08			
39	Letter to Stephen Short from Jessica Philemond dated 4/21/08			
40	HR On Call investigation report			
41	Handwritten list of FCA speakers			
42	List of 2007-2008 FCA speakers			
43	FCA permission slips from 2007-2008 school year			
44	FCA handbook for public schools			
45	Mount Vernon Administrative Guideline 2520C (regarding guest "Resource Speakers")			
46	John Freshwater's handwritten notes regarding FCA permission slip policy			
47	Ohio Academic Content Standards K-12 science			
48	Grade 6 Science Assessment Map			
49	Grade 7 Science Assessment Map			
50	Grade 8 Science Assessment Map			
51	Developing Ohio's Model Curricula for Science and Social Studies			
52	Laminated standards poster			
53	Email and attached statement from J. Stockdale to S. Short dated 05/21/08			
54	"New Evidence of a 'Gay Gene,'" (Time magazine article 06/24/01)			
55	Working Tesla coil model BD-10A			
56	Ziploc bag containing damaged Tesla coil and letter dated 12/29/08 from Mr. Millstone to Mr. Hamilton (1 p.); and letter dated 01/05/09 from Mr. Hamilton to Mr. Millstone (1 p.)			
57	Photographs of destroyed Tesla coil taken by John Freshwater			

58	Elle Button note to Bill White with instructions for Use of Catalog No. 2619 High Frequency Coil			
59	Instructions for Model BD-10A / BD-10AS High Frequency Generator Tesla coil			
60	Handwritten note and handouts from Elle Button to Lynda Weston dated 06/06/03			
61	Memorandum email to Steve Short from Kathryn Button dated 4/21/08 complaining about her experience in John Freshwater classroom			
62	Complaint form filled out by Paul Souhrada on 04/04/06			
63	Letter to John Freshwater from William White and Brad Ritchey dated 1/22/08			
64	Copy of bullet points for Meeting with John Freshwater dated 04/21/08			
65	Letter to John Freshwater from William White dated 4/7/08			
66	Letter to John Freshwater from William White dated 4/14/08			
67	Letter to John Freshwater from Jeff Maley, dated 06/08/06			
68	Press release from Mount Vernon School District regarding John Freshwater investigation from April 2008			
69	Curriculum vitae of David Brian Levy			
70	Curriculum vitae of Joseph E. Faber			
71	Curriculum vitae of Patricia Princehouse			
72	Dr. Patricia Princehouse PowerPoint			
73	Videos of rally on Mount Vernon Square, including video of John Freshwater address			
74	Video of John Freshwater on Fox			
75	CD ("The Right Remedy w/Dr. Patrick Johnston" -- radio show 04/25/09)			
76	Photograph of Legos used in John Freshwater's classroom			
77	Legos used in John Freshwater's classroom			
78	Bob Burney interview with John Freshwater			
79	Point of View interview with John Freshwater			
80	Videos of other John Freshwater support rallies			
81	Statement of John Freshwater from the rally on Mount Vernon square			
82	John Freshwater's copy of <i>Finding Common Ground</i> textbook			

83	Textbook <i>Cells, Heredity, and Classification</i> with notes by John Freshwater			
84	A suggestion to the Mount Vernon City School Board for an objective origins science policy			
85	Amended resolution of intent to consider the termination of the teaching contract of John Freshwater			
86	Mount Vernon City School District Bylaws and Policies			
87	Copy of John Freshwater's handwritten notes dated March 19			
88	Transcript of Freshwater interview with H.R. On Call			
89	Email from Bonnie Schutte to Kathy Kasler dated 8/24/07 discussing surveys of former students of John Freshwater			
90	Various survey responses collected by B. Schutte from former students of John Freshwater			
91	Letter from John Freshwater to Jeff Maley dated 05/01/06 with two (2) pp. of Academic Content Standards; article "Charles Darwin - Origin Theory" (2pp.); article "Darwin's Theory of Evolution – The Premise and Problem" (1 p.)			
92	Ms. Strouse's notes from her observations of John Freshwater's class in 2008			
93	Affidavits of John Freshwater			
94	Affidavit of John Freshwater dated 01/07/2009			
95	Exhibits introduced by John Freshwater or the Mount Vernon School Board during the termination hearings regarding John Freshwater			
96	Exhibits marked at any deposition taken in this matter			
97	Exhibits identified by John Freshwater			
98	Documents produced by the parties to this action			
99	Documents necessary for rebuttal or impeachment purposes			
100	First Amended Complaint			
101	Plaintiffs' Answer to Counterclaim of John Freshwater			
102	Answer of John Freshwater			
103	Defendant/Counterclaimant John Freshwater's Responses to Plaintiff's [sic] First Set of Interrogatories			
104	Defendant/Counterclaimant John Freshwater's Supplemental Responses to Plaintiff's [sic] First Set of Interrogatories			
105	Defendant John Freshwater's Answer to Plaintiffs' Supplemental Interrogatory			
106	Bills from ZD's counselor			

APPENDIX B**TRIAL EXHIBITS OF DEFENDANT
JOHN FRESHWATER**

DX	DESCRIPTION	ID	ADM	BATES	DEPO EX.
A	Freshwater Medical documents				
B	FCA Log of Speakers				
C	Religious Expression in the District, Guideline				
D	Academic Freedom of Teachers, Procedure				
E	Journal Notes of Jenifer Dennis				
F	8th Grade Academic Content Standards				
G	ZD's OAT Test Scores				
H	Freshwater's OAT scores from 2007- 2008				
F	Plaintiffs' Interrogatory Answers and Reponses to Requests for Admissions				
G	Defendants reserve the right to introduce as exhibits any documents exchanged between the parties during discovery in this case				

APPENDIX C**ALTERNATE TRIAL EXHIBITS OF DEFENDANT
JOHN FRESHWATER**

DX	DESCRIPTION	ID	ADM	BATES	DEPO EX.
A	Freshwater Medical documents				
B	FCA Log of Speakers				
C	Religious Expression in the District, Guideline				
D	Academic Freedom of Teachers, procedure				
E	Journal Notes of Jenifer Dennis				
F	8th Grade Academic Content Standards				
G	Photos of Lori Miller's Classroom				
H	Photos of Dino D'ettore's classroom				
I	Prior Evaluations of John Freshwater				
J	Prior Observations of John Freshwater				
K	Schutte Email to Kassler				
L	Cunningham Email re 2006 Complaint				
M	Freshwater Personnel File				
N	Maley Letter to Freshwater 2006				
O	Adkins email re 2006 complaint				
P	Freshwater's Finding Common Ground Book				
Q	ZD's OAT Test Scores				
R	Freshwater's OAT scores from 2007- 2008				
S	Plaintiffs' Interrogatory Answers and Responses to Requests for Admissions				
T	American Flag Poster				
U	Defendants reserve the right to introduce as exhibits any documents exchanged between the parties during discovery in this case				